UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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HONORABLE EDWARD RAFEEDIE, JUDGE PRESIDING

RICHARD D. GREEN,
PLAINTIFF,

VS.

GERBER PRODUCTS,
DEFENDANT.

CASE NO. CV-95-8380-ER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, APRIL 29, 1996

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OFFICIAL COURT REPORTER
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APPEARANCES:

FOR THE PLAINTIFF:

POMS, SMITH, LANDE & ROSE
CHARLES ROSENBERG
2029 CENTURY PARK EAST
38TH FLOOR
LOS ANGELES, CALIFORNIA 90067

FOR THE DEFENDANT:

QUINN, KULLY & MORROW
KELLEY P. POTTER
520 SOUTH GRAND AVENUE, 8TH FLOOR
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- AND -
PRICE, HENEVELD, COOPER,
DEWITT & LITTON
JAMES A. MITCHELL
695 KENMOOR, S.E.
GRAND RAPIDS, MICHIGAN 49501

LOS ANGELES, CALIFORNIA;
MONDAY, APRIL 29, 1996
(10:00 A.M.)

THE CLERK: ITEM NUMBER THREE, CIVIL 95-8380, RICHARD GREEN V. GERBER PRODUCTS.

COUNSEL, PLEASE STATE YOUR NAMES FOR THE RECORD, PLEASE.

MR. ROSENBERG: GOOD MORNING, YOUR HONOR. CHARLES ROSENBERG FOR THE PLAINTIFF, RICHARD GREEN.

MS. POTTER: GOOD MORNING, YOUR HONOR. KELLY POTTER OF QUINN, KULLY AND MORROW, HERE ON BEHALF OF DEFENDANT GERBER.

THIS MORNING MICHIGAN COUNSEL, JIM MITCHELL, WILL BE ARGUING ON BEHALF OF GERBER.

MR. MITCHELL: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING.

WELL, IN THIS PATENT CASE, THE PLAINTIFF CLAIMS THAT THE DEFENDANT INFRINGES DESIGN PATENT ON THE BABY BOTTLE CAP.

THE PLAINTIFF HAS FILED A MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF INFRINGEMENT, AND THE DEFENDANT HAS COUNTERED WITH A MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF PATENT VALIDITY.

THE COURT HAS REVIEWED CAREFULLY EACH OF THE POSITIONS TAKEN BY THE PARTIES IN THIS CASE. MY TENTATIVE CONCLUSION AT THIS TIME IS AS FOLLOWS: THAT THE COURT SHOULD HOLD THAT THE GREEN PATENT IS VALID AS NARROWLY INTERPRETED AND HOLD THAT THE GREEN PATENT

IS NOT INFRINGED BY THE GERBER PRODUCT FOR THE FOLLOWING REASONS:

FIRST, OF COURSE, THE QUESTION OF PATENT VALIDITY IS A QUESTION OF LAW AND IS, THUS, APPROPRIATE FOR RESOLUTION ON SUMMARY JUDGMENT. WE HAVE THE U.S. SUPREME COURT TELLING US THIS.

THE FIRST CONSIDERATION OF VALIDITY IS WHETHER THE DESIGN IS DICTATED BY FUNCTION. FROM EXAMINING THE ALTERNATE METHODS OF SEALING OF BOTTLE NIPPLES AS PROVIDED IN THE PLAINTIFF'S EXHIBITS FOUR THROUGH SIX AND 38 THROUGH 42, THE COURT CONCLUDES THAT THE PARTICULAR NIPPLE SEAL IS NOT FUNCTIONAL.

THE NEXT CONSIDERATION IS WHETHER THE DESIGN IS OBVIOUS. THE COURT HAS EXAMINED THE SCOPE AND CONTENT OF THE PRIOR ART, AS WELL AS ALL DIFFERENCES BETWEEN THE PRIOR ART AND THE PRESENT PATENT DESIGN, AND THE LEVEL OF ORDINARY SKILL INVOLVED. IN THIS REGARD, THE COURT HAS CONSTRUED THAT THE PATENT DESIGN NARROWLY, AS THE COURT BELIEVES THAT A BROAD INTERPRETATION WOULD LEAD TO A FINDING OF INVALIDITY.

THIS IS TRUE BECAUSE THE ELEMENTS OF A SLOPED BOTTLE CAP AND THE PARTICULAR NIPPLE SEAL DESIGN IN THE GREEN PATENT HAVE BEEN DISCLOSED IN THE PRIOR ART, RANGING FROM THE FRENCH PATENT TO THE CAMPBELL PATENT, AND EVEN TO A PRIOR GERBER PATENT.

ALTHOUGH DISCLOSED ELEMENTS CAN NEVERTHELESS GIVE RISE TO A PATENTABLE DESIGN, IN THIS CASE THE COURT CONCLUDES THAT THE ONLY TWO SUCH ELEMENTS THAT ARE PRESENT HERE

WOULD BE OBVIOUS TO A DESIGNER OF ORDINARY SKILL.

THE COURT WOULD NOT INTERPRET THE PATENT TO BE INVALID IF SUCH INTERPRETATION CAN BE AVOIDED BECAUSE OF THE PRESUMPTION OF PATENT VALIDITY EXPRESSED BY THE SUPREME COURT IN THE *L.A. GEAR* CASE.

HOWEVER, INTERPRETING THE GREEN PATENT SO AS TO AVOID A FINDING OF INVALIDITY LEADS THE COURT TO THE CONCLUSION THAT THERE ARE NO MATERIAL FACTS IN DISPUTE CONCERNING THE ISSUE OF INFRINGEMENT. AND THAT SUMMARY JUDGMENT ON THIS ISSUE IS PROPERLY GRANTED IN FAVOR OF GERBER.

BY INTERPRETING THE GREEN PATENT SO AS TO AVOID INVALIDITY, THE PARTICULAR ANGLES AND SLOPES CHOSEN BY GREEN ARE SIGNIFICANT, AS ACKNOWLEDGED BY GREEN'S OWN EXPERT, WILLIAM TOBIN.

IT IS READILY APPARENT THAT THE GERBER PRODUCT EMPLOYS DIFFERENT PROPORTIONS AND ANGLES THAN THAT OF THE GREEN DESIGN PATENT.

ALTHOUGH INFRINGEMENT IS GENERALLY A QUESTIONS OF FACT, THE COURT NOTES THE FEDERAL CIRCUIT HAS APPROVED OF THE GRANTING OF SUMMARY JUDGMENT WHERE THERE ARE NO DISPUTES OF FACT.

THE COURT BELIEVES THAT THIS IS SUCH A CASE. AND ACCORDINGLY, THE COURT WOULD BE INCLINED TO GRANT SUMMARY JUDGMENT ON THE ISSUE OF INFRINGEMENT TO GERBER.

NOW, COUNSEL, DO YOU WISH TO BE HEARD?

MR. ROSENBERG: YES, YOUR HONOR.

I WOULD LIKE TO ADDRESS THE ISSUE OF VALIDITY BECAUSE THAT IS FUNDAMENTALLY INTERTWINED WITH YOUR RULING ON INFRINGEMENT.

OUR BRIEF POINTED OUT THE —

THE COURT: AREN'T YOU TRYING TO HAVE IT BOTH WAYS HERE BY ASKING FOR BROAD INTERPRETATION?

MR. ROSENBERG: WELL, YOUR HONOR, FIRST OF ALL, THERE IS NO TEACHING OR SUGGESTION IN THE REFERENCES CITED BY GERBER FOR THE DESIGN OF THE GREEN PATENT. THERE IS NO SUGGESTION IN THE FRENCH PATENT TO ZIMMERMAN. ONLY WITH IMPERMISSIBLE HINDSIGHT, YOUR HONOR, IS THIS CONSIDERED TO — THAT THE COURT CONSIDER THE GREEN PATENT TO BE NARROW. IT IS IMPORTANT TO LOOK AT THE DESIGN AS A WHOLE.

THE COURT: YOU ARE NOT TOYING WITH THE COURT'S FINDING OF VALIDITY OF THE PATENT?

MR. ROSENBERG: WELL, YOU ARE GIVING THE GREEN PATENT A VERY NARROW INTERPRETATION, YOUR HONOR.

THE COURT: THAT'S WHAT YOU ARE TOYING WITH.

MR. ROSENBERG: AND I BELIEVE —

THE COURT: HOW WOULD YOU BROADEN THE INTERPRETATION SO AS TO AFFECT THE INFRINGEMENT ISSUE?

MR. ROSENBERG: IT'S IMPORTANT TO LOOK AT THE GREEN PATENT AS IT IS IN ITS TOTALITY AND NOT TO FOCUS ON ANY SMALL ELEMENT.

WE CITED ADDITIONAL AUTHORITIES TO THE COURT THAT SMALL DIFFERENCES IN THE DESIGN

OF AN ACCUSED DEVICE AND THE PATENT IS NOT AVOIDING INFRINGEMENT.

THE COURT: WE ACKNOWLEDGE THAT THAT'S POSSIBLE UNDER SOME CIRCUMSTANCES.

MR. ROSENBERG: IN THIS SITUATION, THE DIFFERENCE IS BETWEEN — MAY I GET THE PRODUCT?

THE COURT: YES.

MR. ROSENBERG: THIS IS SIMILAR TO ONE OF THE BOTTLES THAT WE LODGED WITH THE COURT, YOUR HONOR.

THE DIFFERENCES BETWEEN THE GREEN DESIGN PATENT AND THE ACCUSED PRODUCT ARE INSIGNIFICANT. THEY ARE SUBSTANTIALLY THE SAME.

AND WHEN YOU VIEW UNDER THE ORDINARY OBSERVER TEST, THE DESIGN PATENT AND THE ACCUSED PRODUCT CLEARLY SATISFY THE INFRINGEMENT STANDARDS.

WHEN YOU GO SIDE-BY-SIDE AND LOOK AT THEM IN THEIR TOTALITY WHICH IS WHAT THE TEST IS —

THE COURT: WE ARE NOT SUPPOSED TO COMPARE THEM TO THE PRODUCT. WE SUPPOSED TO COMPARE THEM TO THE PATENT.

MR. ROSENBERG: THE DESIGN PATENT.

THE COURT: YES.

MR. ROSENBERG: TAKE THE DESIGN PATENT AND COMPARE IT TO THE ACCUSED PRODUCT, THE GERBER CAP.

THE COURT: AS REFLECTED IN THE PATENT.

MR. ROSENBERG: AS REFLECTED BY THE GREEN PATENT. THE DIFFERENCES BETWEEN THE

ORNAMENTAL DESIGN FEATURES ON THE PATENT AND THE ACCUSED PRODUCT ARE INSIGNIFICANT. AND SMALL DIFFERENCES, YOUR HONOR, DO NOT AVOID INFRINGEMENT.

THE COURT: WHAT DO YOU SEE AS THE SMALL DIFFERENCES? WHAT DO YOU SEE AS THE KEY TO THE INFRINGEMENT? IF THE SMALL DIFFERENCES DO NOT PRECLUDE INFRINGEMENT, WHAT ARE THE SIMILARITIES WHICH COMPEL THE FINDING OF INFRINGEMENT?

MR. ROSENBERG: THE DESIGN AS A WHOLE, YOUR HONOR. THE GREEN PATENT INCORPORATES AN AESTHETIC DESIGN FEATURE FOR THE NIPPLE SEALING ELEMENT AT THE UPPER PORTION ON THE INSIDE OF THE CAP. THE CAP IS A SHORTER CAP THAN THE GERBER PRIOR ART. THE GERBER PRIOR ART HAD A TALLER CAP. MR. CAMPBELL'S PATENT HAD A TALLER CAP.

THE COURT: YOU CONTEND THOSE DIFFERENCES ARE FUNCTIONAL?

MR. ROSENBERG: NO, THE DIFFERENCES ARE NOT FUNCTIONAL, YOUR HONOR.

IN ORDER TO BE FUNCTIONAL, THE DESIGN WOULD HAVE TO BE DICTATED BY THE FUNCTION, BECAUSE THERE ARE MANY DIFFERENT WAYS FOR THIS TYPE OF DESIGN TO BE MADE TO ACHIEVE THE SAME RESULT. IT IS CLEARLY NOT FUNCTIONAL. THIS WAS A CHOICE OF THE DESIGNER BASED UPON PURELY AESTHETIC REQUIREMENTS.

THE PRIOR ART WE SHOWED IN OUR BRIEF REVEALED THAT THE EXAMINER IN HIS REVIEW OF THE APPLICATION FOUND EIGHT OR NINE DIFFERENT TECHNIQUES TO ACCOMPLISH THE SAME RESULTS. THIS IS NOT DICTATED BY FUNCTION.

THIS IS DICTATED BY PURE ORNAMENTAL AND AESTHETIC PURPOSES.

THE COURT IS GIVING A VERY NARROW INTERPRETATION TO SOMETHING WITHOUT JUSTIFICATION.

THE COURT: THE POINT IS THAT IF YOU GIVE A BROADER INTERPRETATION, IT WOULD THREATEN A FINDING OF INVALIDITY.

MR. ROSENBERG: I DISAGREE WITH THAT RESULT BECAUSE I THINK THE COURT IS PROBABLY SAYING THAT THE VALIDITY MIGHT BE CHALLENGED BY THE CAMPBELL PATENT AND FRENCH PATENT TO ZIMMERMAN. BUT IN ORDER TO DEFINE THOSE REFERENCES, WE NEED TO SEE A TEACHING OR SUGGESTION. THERE IS NO TEACHING OR SUGGESTION.

I THINK THE COURT IS USING A FUNCTIONAL STANDARD FOR COMING UP WITH AN OBVIOUS CONCLUSION. IT'S NOT A FUNCTIONAL STANDARD. THE FEDERAL CIRCUIT REPEATEDLY IN THE AUTHORITIES WE CITED SAID YOU MUST LOOK AT THE AESTHETIC AND ORNAMENTAL CHARACTERISTICS OF THE PRODUCT TO SEE IF THAT SUGGESTS THE INVENTION.

THE FRENCH PATENT, WHICH IS ONE OF THE EXHIBITS, IS A PATENT THAT IS RECTANGLE OR CYLINDRICAL IN CROSS-SECTION.

TO SUGGEST THAT THIS IS OBVIOUS OR NARROW, YOU HAVE TO PICK AND CHOOSE AMONG CERTAIN CHARACTERISTICS OF THE FRENCH PATENT TO COMBINE WITH THE PRIOR ART PATENT. THAT'S NOT THE LAW. YOU ARE NOT SUPPOSED TO PICK AND CHOOSE.

IF THE COURT WANTED TO PICK AND CHOOSE, AS GERBER SUGGESTED SHOULD BE DONE, THEN WHY NOT CHANGE THE WHOLE DESIGN. WHY NOT MAKE IT RECTANGULAR IN SHAPE AND CLEAN UP THE TOP. THERE ARE MANY WAYS TO HAVE MADE THIS DESIGN.

THE COURT: ALL RIGHT, COUNSEL.

MR. ROSENBERG: THE FRENCH PATENT SUGGESTS MANY ALTERNATIVE WAYS, BUT, YET, THE COURT IS GOING WITH HINDSIGHT.

THE COURT: YOU ARE REPEATING ARGUMENT THAT YOU ALREADY MADE. SO I WILL HEAR FROM THE OTHER SIDE FOR A MOMENT.

MR. ROSENBERG: COULD I HAVE ONE LAST POINT, YOUR HONOR.

WE FILED A STATEMENT OF UNDISPUTED FACTS. WE WOULD LIKE TO POINT OUT THAT GERBER DID NOT FILE ANY ADMISSIBLE EVIDENCE IN OPPOSITION TO OUR STATEMENTS, SO THEY WILL NOT SHOW ANYTHING —

THE COURT: WHAT IS THE SIGNIFICANCE OF THAT?

MR. ROSENBERG: THEY HAVE NO EVIDENCE. JUST POINTING OUT SOMETHING. UNDER THE LOCAL RULES THEY WERE OBLIGATED TO COME FORWARD WITH ADMISSIBLE TRIAL TESTIMONY. THEY DID NOT HAVE ANY ADMISSIBLE TRIAL TESTIMONY, MERELY ARGUMENT OF COUNSEL.

THE COURT: THEY HAVE SUBMITTED EVIDENCE.

WHAT IS WRONG WITH HIS ARGUMENT?

MR. MITCHELL: THANK YOU, YOUR HONOR. I AM GLAD TO ADDRESS THOSE.

WE CONCUR, OBVIOUSLY, IN YOUR TENTATIVE JUDGMENT THAT IF YOU INTERPRET THIS CLAIM, THIS PATENT IN SUCH A WAY AS TO RENDER IT VALID, YOU HAVE TO FIND THAT GERBER DOES NOT INFRINGE.

COUNSEL WANTS TO IGNORE THE POINT OF NOVELTY TEST, WHICH THE FEDERAL CIRCUIT HAS REPEATEDLY REITERATED MUST BE CONSIDERED IN DESIGN PATENT CASES.

IN TWO OF THE CASES THAT WE CITED, *LITTON SYSTEMS* AND FMC, THE PLAINTIFFS MADE EXACTLY THIS KIND OF ARGUMENT. WELL, YOU HAVE TO LOOK AT THE DESIGN AS A WHOLE.

AND IN EACH CASE, THE COURT SAID FOR A DESIGN PATENT TO BE INFRINGED, HOWEVER, NO MATTER HOW SIMILAR TWO ITEMS LOOK, THE ACCUSED DEVICE MUST APPROPRIATE THE NOVELTY IN THE PATENTED DEVICE WHICH DISTINGUISHES IT FROM THE PRIOR ART.

THE COURT: WHAT IS THE NOVELTY THAT YOU THINK IS INVOLVED HERE?

MR. MITCHELL: IF THERE IS ANY NOVELTY AT ALL —

THE COURT: IS THERE? WHAT IS THE NOVELTY THAT THE PLAINTIFF IS CLAIMING?

MR. MITCHELL: THE NOVELTY THAT WE SEE THAT CAN BE ARGUED, IS THAT RATHER THAN USING A SQUARED OFF EDGE HERE OR SHARP ANGLE BETWEEN THIS BASE RING AND THE LEDGE, AS GERBER DID OR AS CAMPBELL DID, EITHER ONE, THE PLAINTIFF MADE A ROUNDED SHOULDER, ALL RIGHT. THAT'S ONE POINT OF DISTINCTION.

AND AS FOR THE NIPPLE SEAL ITSELF, THE PLAINTIFF RATHER THAN — BOTH THE PLAINTIFF STRUCTURE AND THE PRIOR ART, THE FRENCH

STRUCTURE, AND I DON'T CARE IF YOU LOOK AT THEIR COMMERCIAL STRUCTURE OR DESIGN PATENT. IT DOESN'T MAKE ANY DIFFERENCE TO ME. BUT BOTH OF THEM HAVE A HEMISPHERICAL DOME THAT SITS DOWN OVER THE TOP OF THE NIPPLE AND BOTH OF THE DOMES ARE RECESSED FROM THE TOP WALL AND BOTH OF THEM HAVE A CIRCUMFERENCE WALL COMING DOWN FROM THE TOP OF THE DOME — DOWN FROM THE TOP WALL TO THE BOTTOM OF THE DOME, OKAY.

BUT THE ONE DISTINCTION IS, AND GREEN'S EXPERT EMPHASIZED THIS POINT, THE VERTICAL WALL, THE WALL, THE CIRCUMFERENTIAL WALL ROUNDED THE DOME IN THE GREEN DESIGN IS ALMOST VERTICAL. WHEREAS IN THE PRIOR FRENCH PATENT, THAT WALL WAS INCLINED AT AN ANGLE. THOSE WOULD BE THE ONLY TWO POINTS OF NOVELTY, AND BOTH OF THOSE ARE FEATURES WHICH THE GERBER PRODUCT DOES NOT EMPLOY.

THE GERBER PRODUCT IS NOTHING MORE THAN GERBER PRIOR ART DESIGN, WHICH IS DISCLOSED IN A 12-YEAR OLD DESIGN PATENT. NOTHING MORE THAN A PRIOR ART DESIGN TO WHICH THE NIPPLE SEAL EXACTLY LIKE THE NIPPLE SEAL DISCLOSED IN THE FRENCH PATENT HAS BEEN ADDED. IT IS EXACTLY THE SAME KIND. GOT THE SLOPED WALLS COMING DOWN AT AN ANGLE RATHER THAN COMING VERTICALLY AS IN THE GREEN DESIGN.

NOW, AS FOR PLAINTIFF'S DISCUSSION ABOUT IT'S NOT SUGGESTED IN THE PRIOR. WHAT IS TO SUGGEST, YOUR HONOR? I'M CAMPBELL, OR I AM GERBER, AND I WANT TO PUT A NIPPLE SEAL ON THE TOP OF THE NIPPLE COVER, OKAY. WELL, WHAT IS TO SUGGEST? I'M LOOKING FOR PRIOR ART. I SEE HERE ONE IN THE PATENT. I'LL JUST USE

THIS. WHAT IS THE BIG DEAL? THERE IS NOTHING TO SUGGEST. THIS IS A CLEAR TEACHING IN THE PRIOR ART. WE ARE ENTITLED TO USE TEACHINGS IN THE PRIOR ART. WE ARE ENTITLED TO TAKE OUR OWN PRIOR ART DESIGN IN, PUT A NIPPLE SEAL IN IT, JUST LIKE ONE WE FOUND IN THE PRIOR ART.

SO WE BELIEVE YOUR HONOR IS ABSOLUTELY CORRECT. THERE ARE TWO POINTS OF NOVELTY WHICH WE THINK ULTIMATELY WILL NOT BE SUFFICIENT TO ESTABLISH THE VALIDITY OF THE PATENT, BUT WE UNDERSTAND YOUR HONOR SAYING THAT RAISES AN ISSUE OF FACT AND THE ISSUE OF VALIDITY, FINE.

BUT IF IT DOES, IF THOSE ARE THE ONLY POINTS OF NOVELTY, AND THEY ARE, THEN IT IS CLEAR THAT GERBER CANNOT, AS A MATTER OF LAW, INFRINGE THE PATENT BECAUSE GERBER HAS NOT APPROPRIATED THOSE TWO FEATURES.

THE COURT: ALL RIGHT.

JUST ONE MINUTE AND NO MORE, COUNSEL. I HAVE HEARD YOUR ARGUMENTS. I DON'T WANT TO SPEND TOO MUCH TIME ON THIS.

MR. ROSENBERG: FIRST OF ALL, YOUR HONOR, WE FILED A DECLARATION FOR ADDITIONAL DISCOVERY, 56(F) DECLARATION, I BELIEVE IT IS. WE HAVE NOT TAKEN DISCOVERY. WE DON'T KNOW IF GERBER COPIED THE GREEN DESIGN. CERTAINLY, IF GERBER COPIED THE GREEN DESIGN, AS WE THINK THE EVIDENCE WILL SHOW, THEN THE TENTATIVE CONCLUSION THAT THE PATENT SHOULD HAVE A NARROW SCOPE WOULD NOT BE SUPPORTED. WE THINK WE ARE ENTITLED TO HAVE THAT DISCOVERY, YOUR HONOR. THERE MAY BE OTHER SECONDARY ISSUES OF NON-OBVIOUSNESS —

THE COURT: THIS CASE WAS FILED LAST YEAR. HOW COME YOU HAVEN'T HAD ANY DISCOVERY?

MR. ROSENBERG: WELL, THE PARTIES HAVE BEEN TRYING TO AGREE ON A PROTECTIVE ORDER. WE HAVE BEEN ABLE TO DO SO. WE FILED OUR MOTION. GERBER ASKED FOR AN EXTENSION OF TIME TO DO DISCOVERY. THE COURT REMEMBERS THE EX PARTE APPLICATIONS THAT WERE FILED FOR CONTINUANCE OF THE MOTION. WE GRANTED GERBER A CONTINUANCE BECAUSE OF THE NATURE OF DISCOVERY. THEY ASKED FOR ADDITIONAL TIME. WE SAID FINE. THEY HAVE NOT GIVEN US ANY DISCOVERY. WE PUT AN APPLICATION IN UNDER DECLARATION SAYING WE NEED THAT DISCOVERY.

IF THEY COPIED THE GREEN DESIGN, THE PATENT HAS A MUCH BROADER SCOPE THAN THE COURT IS WILLING TO GIVE IT. COMMERCIAL SUCCESS ALSO SHOULD BE A FACTOR.

ALSO, WHAT COUNSEL DID, YOUR HONOR, IS EXACTLY WHAT THE PATENT EXAMINER DID IN THE *IN RE HARVEY* CASE. MR. MITCHELL TAKES A FUNCTIONAL ELEMENT AND SAYS: IT WOULD BE OBVIOUS TO MOVE IT OVER TO A PRIOR ART DEVICE. THE FEDERAL CIRCUIT SAID THAT'S NOT THE TEST. THERE IS NO TEACHING OR SUGGESTION HERE TO MAKE THIS ORNAMENTAL CHANGE. YOU CAN MAKE MANY CHANGES, YOUR HONOR.

THE COURT: ALL RIGHT. THAT'S ENOUGH, COUNSEL.

THE MATTER WILL BE SUBMITTED.

(PROCEEDINGS ADJOURNED.)

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I, MARY TUCKER, CSR, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS TRUE AND CORRECT.

/S/ MARY TUCKER 5-20-96

MARY TUCKER, CSR DATE